

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
South Bend Division

US EPA RECORD CENTER REGION 5



591080

978373

----- x
UNITED STATES OF AMERICA,

Plaintiff,

v.

Civil Action No. S90-0056

CONSOLIDATED RAIL CORPORATION,
a/k/a CONRAIL,

Defendant.
----- x

Washington, D.C.

Wednesday, June 30, 1993

Deposition of

MARTIN J. MESSLER, JR.

a witness of lawful age, taken on behalf of the Plaintiff in
the above-entitled action, before Susan C. Spector, Notary
Public in and for the District of Columbia, in the offices of
Bingham, Dana & Gould, 1550 M Street, N.W., Suite 1200,
Washington, D.C., 20005, commencing at 1:00 p.m.

Diversified Reporting Services, Inc.

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WASHINGTON, D.C. 20006

(202) 296-2929

APPEARANCES**On Behalf of the Plaintiff:**

PETER H. RUVOLO, ESQ.
U. S. Department of Justice
Environmental Enforcement Section
10th & Constitution Ave, N.W.
Washington, D.C. 20530

On Behalf of the Defendant CONRAIL:

JAMES A. ERMILIO, ESQ.
Bingham, Dana & Gould
1550 M Street, N.W.
Suite 1200
Washington, D.C. 20005

* * * * *

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C O N T E N T S

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Counsel for Plaintiff	
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P R O C E E D I N G S

MR. RUVOLO: Let's mark this Exhibit 1.

(Messler Deposition Exhibit No. 1
was marked for identification.)

Whereupon,

MARTIN JAMES MESSLER, JR.

was called as a witness and, having been first duly sworn,
was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFF

BY MR. RUVOLO:

Q Would you please state your full name, Mr. Messler?

A It's Martin James Messler, Junior.

Q And your address?

A My home address?

Q Yes.

A [REDACTED] (b) (6)

Q And do you have a telephone number there?

A Yes, I do. Area code [REDACTED] (b) (6)

Q And just for the record, your business address?

A My business address is Suite 200, 241 Main Street,
Buffalo, New York 14203.

Q And phone number?

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1 A Area code (716) 846-2903.

2 Q Just by way of introduction, my name is Peter
3 Ruvolo. I work for the Department of Justice and we
4 represent the EPA, Environmental Protection Agency, in this
5 matter, which I'm sure you have been briefed on, at least
6 generally. It's a suit against CONRAIL in regard to alleged
7 hazardous waste disposals at the Elkhart railroad yard in
8 Elkhart, Indiana.

9 I would like to ask you some questions and get some
10 background from you, find out what you do and what, if any,
11 relationship your duties have towards this proceeding. If I
12 sometimes jumble or mumble my questions, don't hesitate to
13 say you don't understand and I'll try to rephrase. If you
14 need time to take a break or something like that, don't
15 hesitate to say so and we'll take a break. I don't think
16 we're going to be here that long, but just in case.

17 A Okay.

18 Q Mr. Messler, would tell us your current occupation?

19 A My current occupation is manager of Quality
20 Assurance Litigation for Claims Services of Consolidated Rail
21 Corporation.

22 Q And what are the functions of the manager of

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1 Quality Assurance?

2 A My basic function is dealing with loss and damage
3 claims that are filed against CONRAIL by our customers. And
4 in my regard as to quality assurance, I have a group who
5 works for me doing audit of payments and disallowances made
6 by other areas within the claims services of claims filed.

7 My responsibilities of litigation, say, if we say
8 no to a customer and they in turn file suit to the bill of
9 lading contracts, I then act as a liaison between the claim
10 office and our inside counsel, as well as outside attorneys
11 which we hire, and I also end up having to give them the
12 levels of authority if we do settle.

13 Q I see. Okay. I take it there are various claims
14 that are generally filed. I mean, they have a claim for loss
15 of lading or you may have a claim for damage to a car, for
16 example. Would that be correct?

17 A Those are types of damages.

18 Q When you handle claims, what types of claims do you
19 handle?

20 A Strictly damage to lading.

21 Q Nothing to do with the car itself?

22 A Not unless the car was the lading.

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1 Q How long have you been in this particular position?

2 A I've been in this particular position possibly for
3 the last ten years.

4 Q I see. How long have you been with CONRAIL?

5 A About twenty-four years.

6 Q And prior to that?

7 A And prior to that I was in college.

8 Q So you've been with CONRAIL now since the late
9 sixties?

10 A Right, 1969.

11 MR. ERMILIO: Although CONRAIL wasn't in existence
12 at that time.

13 BY MR. RUVOLO:

14 Q What was the title of the company between 1969 and
15 1976, say, or 1973?

16 A Penn Central Corporation.

17 Q Oh, so you worked for Penn Central?

18 A Yes.

19 Q I see. And let's talk about that period during
20 which you worked for Penn Central. What were your functions
21 at that time?

22 A I first hired on with Penn Central as an internal

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1 auditor.

2 Q And then?

3 A And then I was transferred into their freight claim
4 department.

5 Q And approximately when was that?

6 A I transferred in 19 -- I think it was around mid
7 1970. I think it was between March and June of 1970.

8 Q And I take you weren't the supervisor at that time.
9 What was your basic duties?

10 A I was a supervisor of statistics at that time which
11 the duties were the accounting functions for the freight
12 claim department.

13 Q Was the freight claim department basically similar
14 in operation as it is today? I mean, other than the fact
15 that it might have been smaller, were the duties and
16 responsibilities of the department the same?

17 A Yes.

18 Q And again, it was just handling the loss of lading
19 unless it was a particular -- the car itself was a piece of
20 lading?

21 A Yes.

22 Q And are there other offices or is this the main

1 office for handling lading and claims at the time with Penn
2 Central?

3 A As far as --

4 Q Well, let me strike that and go back a little bit.
5 Where was the claims office for Penn Central located at that
6 time, say between 1969 and 1970 something?

7 A Buffalo, New York.

8 Q Buffalo?

9 A Yes.

10 Q Okay. And was it the function of the claims
11 department at that time to handle claims throughout the
12 system that would come in or did you have other offices
13 located throughout the country?

14 A To the best of my recollection, they were all
15 claims of Buffalo at that time, yes.

16 Q At that time, was Penn Central operating the
17 railroad facility out in Elkhart, Indiana, to your knowledge?

18 A I really don't know that.

19 Q If there were a claim coming out of Elkhart, it
20 would pass through the Buffalo office I would take it?

21 A I don't --

22 Q If there was a loss of lading claim for damages

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1 sustained at the Elkhart yard, for example?

2 A If that was part of Penn Central?

3 Q Right.

4 A Yes.

5 Q Now, when you say loss of lading claims, that could
6 be any type of commodity, I would take it? We're not just
7 talking about hazardous materials. We're talking about -- it
8 would be milk or wood or lumber or something of that nature?

9 A Yes.

10 Q And what would be the claim process? In other
11 words, how would you get involved? Would it be after a suit
12 or after a claim is made by the owner or the consignee, or
13 would you get a claim report if an incident occurred?

14 A To start a claim it would have to be filed by the
15 owner of the goods.

16 Q And then what would your office do?

17 A We would then do an investigation, try to determine
18 the facts, determining is the claim valid, is it properly
19 supported, are they the rightful owner, and then it did it
20 comply at that time with the bill of lading contract.

21 Q But your office would do that investigation?

22 A Yes.

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1 Q And that would mean contacting various people
2 throughout where the incident may have occurred in getting
3 reports or would you actually go out?

4 A For the most part the reports would already be with
5 us. I can't think of an instance where I would go searching.
6 If there was something that happened to cause damage to a
7 lading, the standard operating instructions are you send a
8 copy of that to Claims Services in Buffalo, New York, for our
9 file.

10 Q I see. Just in case a suit or a claim was later
11 made?

12 A Right.

13 Q And I take it if the loss was the result of damage
14 to a car, for example, the report concerning the damage after
15 it's investigated would also be sent to your office?

16 A I don't follow that question.

17 Q Well, if a car was damaged and as a result of the
18 damage there was a loss of lading, you would get a report on
19 the loss of lading. But the damage to the car would have to
20 be reported, maybe at a later date, after it was
21 investigated, is that so?

22 A If I understand you right, the car is damaged so

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1 they would know that. And at that time they found lading
2 damage, yes, they would notify us.

3 Q Okay. What would the normal typical claim file
4 include? And I'm keeping you to that time, 1969 to 1973.

5 A Okay. Well, a claim would come in so you would
6 have a presentation form from the customer and normally you
7 would support that with something to prove the value, the
8 invoice say. And a lot of times it would be supported with
9 an inspection report which would tell this was damaged. And
10 by "inspection report," I mean one that was prepared by the
11 railroad or an agency that we might hire. That would come in
12 and that would be entered into our data system.

13 Our data system then would go and match up any
14 in-house records that we had. Our way of matching is based
15 on the car number and waybill date. And if we make the
16 match, then we go to the file cabinets and retrieve those
17 records and attach that to the file, and we analyze it. And
18 if we have enough there that says, yes, we did do the
19 damages, then we send it back through our data system and
20 issue a check to the customer.

21 Q Was Penn Central self-insured at that time, do you
22 recall?

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1 A Yes.

2 Q Okay. So would the insurance department of Penn
3 Central be notified as well?

4 A No.

5 Q Okay. And if you disputed the claim, would it then
6 be referred to your litigation department in-house?

7 A No.

8 Q So if you disputed the claim and then a suit was
9 later brought, then the litigation department would contact
10 you and ask for the file?

11 A Yes.

12 Q Or outside counsel?

13 A (Nodding head.)

14 Q Was a distinction made between a loss of lading
15 involving hazardous materials, such as propane gas or
16 something of that nature, as contrasted with a loss of lading
17 for lumber?

18 A No.

19 Q If a claim was made regarding a hazardous material,
20 did you have to, or did you not necessarily have to, but did
21 you take any steps, notify anybody involving the contents?

22 A No.

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1 Q That was not your function?

2 A No.

3 Q And were these records or these claim files that
4 you kept, were they also on a computer or were they manual
5 files?

6 A The file itself would be manual, but the access to
7 it would be through our data system.

8 Q Okay.

9 A If you came and wanted a record, you would just
10 give me a car number and a waybill date, then I could access
11 it through the system. And the system would say it's in
12 manila folder number 541. That was our mechanized filing
13 system.

14 Q I see. You didn't make -- we didn't have computers
15 then that we have today, but you didn't make photocopies of
16 these records or documents? It was just an input into the
17 system to tell you where the files were located?

18 A Yes.

19 Q Did there come a time later that you did make
20 either microfilm or photocopies of these claims forms?

21 A I don't ever recall a claim -- the claim itself
22 never went on microfilm. No, we always stored that manually.

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1 Q And how long would you retain these files?

2 A We normally tried to follow the ICC regulations on
3 that which were -- I think with claims it's three to four
4 years after they have been settled.

5 Q After the settlement of the claim?

6 A Yes.

7 Q And when I say retained -- when you say "retained,"
8 are we talking about the actual files in your office or are
9 we talking about them being sent to storage someplace?

10 A We maintain our own files, so they were kept in our
11 department.

12 Q And would the same be true for the database? Would
13 that have been retained for the three years in your
14 department?

15 A Our active data is kept for three years, on-line
16 data, yes, to match with the actual files that we have
17 available to us.

18 Q And after the three years, would the documents be
19 sent to a storage facility?

20 A No, usually we would send in a request based on the
21 ICC statute that it requests to have them destroyed. That
22 would come back signed and we would pull between certain

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1 dates and send them off to be shredded.

2 Q Unless there was some pending litigation or some
3 claim for lading?

4 A Yes, right.

5 Q So that if I'm clear -- well, is the same policy
6 followed today in CONRAIL?

7 A Yes.

8 Q As far as record retention?

9 A Yes.

10 Q It's three years?

11 A Uh-huh.

12 Q And then if there is no claim, it would go and be
13 destroyed?

14 A Well, actually if there is no claim, I think the
15 time frame is shorter. I think inspection records, which we
16 call 1204s, I think, if my memory serves me right, those we
17 can destroy a year after they're made unless there is a
18 claim. If we have no record of a claim then those just get
19 dumped. Inspection records and any other records that might
20 have been sent in to us concerning damage to lading, if I
21 remember right, it's one year after as long as there is no
22 notice of claim.

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1 Q Going back to the earlier period, so that to your
2 knowledge there would be no records contained in the
3 insurance department or the claims department's files of any
4 claims made prior to -- or prior to 19 -- well, they weren't
5 in existence then, but there would be no records today of any
6 claims made during that period, 1969 to 1973, 1976?

7 A To my knowledge, no.

8 Q When the change-over occurred between Penn Central
9 and CONRAIL, how were the files or the claims files handled
10 at that time?

11 A Okay. When CONRAIL came into existence, I then
12 became an employee of CONRAIL. And we then had an agency
13 agreement with Penn Central to continue to handle some of
14 their work. So the actual change-over was April 1, 1976. If
15 the claim was there March 30th, it was with me April 1st.

16 Q Right. And it would still be handled through your
17 department?

18 A Yes.

19 Q Until it was resolved?

20 A Yes.

21 Q And then assuming it wasn't in litigation, after
22 three years the files were destroyed or were they sent to

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1 Penn Central?

2 A Since Penn Central was in bankruptcy, they may have
3 been sent to them, but I don't know that for sure.

4 Q Do you know whether Penn Central retains any of
5 those records today?

6 A No, I do not.

7 Q Okay. Now, we take over in 1976. You are working
8 for CONRAIL making a lot more money. What's the policy of
9 the procedure of the claims department at that time?

10 A Actually as far as policy and procedure, nothing
11 really changed.

12 Q You still carry on as previous?

13 A Yes.

14 Q Record retention policy was still as you have told
15 us, the three years except for some of the exceptions?

16 A Yes.

17 Q No distinction made between claims for hazardous
18 materials loss as contrasted with losses for lading that were
19 non-hazardous?

20 A No.

21 Q Okay. Going back one further question on the Penn
22 Central era, do you recall any claims made for loss of lading

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1 that consisted of carbon tetrachloride?

2 A I do not.

3 Q Since your tenure at CONRAIL, do you recall or have
4 knowledge of any claims made for loss of lading involving
5 carbon tetrachloride?

6 A I do not.

7 Q All right. Let me give you a little scenario and
8 see if you can tell me how this would be investigated or how
9 it checked out. Suppose I order 20,000 gallons of milk from
10 a Maryland dairy to be shipped to my cheese-processing plant
11 in Wisconsin, and put it in a car and put on the railroad. I
12 take it at some point, once it's loaded, the car is weighed?

13 A Normally it is or you can -- we may have a weight
14 agreement with you as the shipper that we would accept your
15 weight. We would not physically weigh it ourself as a
16 railroad.

17 Q Is it, to your knowledge, weighed at any time prior
18 to its arrival up in Wisconsin?

19 A Not unless it's so ordered by you or your receiver.
20 I would not think that as a normal course of business. The
21 railroad would not unless they were asked to do that and paid
22 a fee.

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1 Q Now, a bill of lading would be issued?

2 A Yes.

3 Q And that would tell you the contents and volume,
4 where its destination is. What else would be on the bill of
5 lading?

6 A The shipper, the consignee, to describe the
7 commodity, the weight, show the car number, show the date.
8 That's about all I can recall.

9 Q Now, some period of time of time later my car
10 arrives in Wisconsin after having passed through the CONRAIL
11 system. And instead of my 30,000 gallons of milk, or 20,000
12 gallons, I'm down to 5,000 gallons of milk, and I file a
13 claim. What happens to my claim? I mean, once you receive
14 it, what do you do about my claim?

15 A I get your claim. I enter it into my data system.
16 It gives me all the matches of any records I have. If the
17 records I have support your loss and your documentation
18 supports it, then I write a check to you.

19 Q All right. Suppose my claim has no knowledge of
20 how the loss occurred. I mean there was no accident that I'm
21 aware of. All I know is it left with 20,000 gallons and it
22 arrived with 5,000 gallons. Is any investigation made by

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1 your department?

2 A Well, our investigation would be going into our
3 files. If it had been in a derailment or some unusual
4 happening, then a report would have been issued and it would
5 have been sent in to us, on CONRAIL.

6 Now if it was on Wisconsin Central, say, if the
7 amount of money was large enough, I would then write to them
8 and say do you have any record of an unusual occurrence. If
9 they all came back and said no, then --

10 Q How do you define an unusual occurrence? I know
11 there are UOR reports, but how do you define them?

12 A Anything that's on an unusual occurrence report.

13 Q No, what would be required for an UOR to be filed
14 or made? A derailment?

15 A I'd say yes.

16 Q And the nature of the product?

17 A I don't know that. I don't know.

18 Q For example, if there wasn't a derailment, but
19 there was a spill or an open valve or something causing a
20 spill of a particular, say, hazardous material, would a UOR
21 be reported for that?

22 A I believe so, yes.

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1 Q Would you get a copy of that in your files?

2 A I would say yes.

3 Q Now, suppose my car with the milk is in tip top
4 shape. It arrives at the Elkhart facility in the receiving
5 yard. It's inspected. Everything appears to be fine. Then
6 it has to be rerouted to Wisconsin, so it goes through the
7 humping yard and goes through the humping process. And in
8 the course of humping process, there is a coupling accident
9 and the couples miss-hit and there is spillage. Would a UOR
10 be filed under those circumstances?

11 A I believe so, yes.

12 Q Regardless of the product again?

13 A Yes.

14 Q All right. Continuing on, nobody notices this
15 spill at the time and the car proceeds down one of the tracks
16 and hooks up with another train and goes on its way towards
17 Wisconsin, and I file a claim for, number one, loss of
18 lading. Again, what would be your process in such an
19 instance? What would your department do to investigate that
20 claim?

21 A It would be the same as I said previously. We would
22 run it in our system and check our records. If I had no

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1 matches, then I would write the designation carrier and ask
2 them if they have any records.

3 Q As distinguished from me being the owner of the
4 milk that's being shipped, the tank car owner, Borden's Milk
5 Company's car gets to Wisconsin and they say, "Hey, what the
6 heck happened to our car? It's got a hole in it." Again,
7 would you trace the trail of that train back to Maryland to
8 find out whether there were any derailments or whether there
9 were any coupling accidents or incidents of any sort?

10 A I probably wouldn't see that claim.

11 Q That would go to a different department?

12 A Because that's not lading, right.

13 Q So who would Borden file its claim with?

14 A I really don't know. He may just file with -- I
15 really don't know. He could file with any -- I assume that
16 their equipment rules are the same as the loss and damage
17 rules where he could file with either carrier, either origin
18 or destination.

19 MR. ERMILIO: Peter, I just want to confirm at
20 least for my own understanding, you are talking about a
21 situation where there is no loss of lading, but there is
22 damage to a car.

1 MR. RUVOLO: It could be both. If it was a loss of
2 lading, he would get a claim made for loss of lading.

3 MR. ERMILIO: Right. He's explained that
4 situation. I understood and I believe Mr. Messler understood
5 your last question to be just a car that had been damaged.

6 MR. RUVOLO: No, it was part of the other
7 question. One is I would make a claim for the loss of the
8 milk, but Borden, who owns the car, would also make a claim
9 for the damage to the car.

10 MR. ERMILIO: Okay.

11 THE WITNESS: They would probably come to you. If
12 you had leased car, they would come to you.

13 BY MR. RUVOLO:

14 Q So then it would be included in my claim?

15 A No. Then you would have to go against one of the
16 carriers, yes. It would be a claim, but not as lading.

17 Q My question is, who would pay for the damage to the
18 car itself?

19 A I don't really know. If they located it with one
20 of the carriers I would say then the carriers would pay. But
21 if they can't locate it then --

22 Q Is CONRAIL insured against damage to cars, railroad

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1 cars, that are not their own?

2 A I don't know that.

3 Q Now, did there come a time when your system was
4 updated for maintaining records and claims? Your claim
5 files, for example, did there ever come a time when you
6 started putting them on computer?

7 A I don't --

8 Q I mean, is the system still the same? You
9 manually have folders in a file cabinet containing your claim
10 folders, claim files?

11 A Claim files themselves, yes.

12 Q Is there any kind of computer record kept as well,
13 a database base kept of these, other than being able to go to
14 a database and find out what file cabinet and folders?

15 A I guess I don't understand your question. I guess
16 I'm --

17 Q Well, if, for example, a claim came in and you
18 decided not to pay them and it was referred to the litigation
19 department, would it be done with the actual folder be
20 delivered to the litigation department or would you be able
21 to type it into your computer and send it to the litigation
22 department?

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1 A No. It would go to the litigation department, but
2 there also would be a data entry created giving it a claim
3 number that would tell me it's in litigation. Which a claim
4 number is just a method of us filing the claim.

5 Q So you know where it's at?

6 A Yes.

7 Q But there is no actual copies made on any kind of a
8 database of the file itself?

9 A No.

10 Q Is there any listing made on any computer database
11 that keeps track of what when a claim came in what it
12 contained and how much it was for and who the parties were?

13 A That's in our database. That information is in
14 there.

15 Q Okay. What else is in your database?

16 A We have our inspection records, unusual occurrence
17 reports, wreck files. We may have some police reports.
18 That's about it. That's it that I can think of.

19 Q And where is that database kept, in Buffalo?

20 A It's an on-line database. The actual bites of
21 information would be in our main computer center in
22 Philadelphia.

1 Q Would other offices, such as Philadelphia or
2 yourself and any others, have access to that database? Could
3 they get into a file?

4 A Not without specific authority from us. That's
5 actually our working database. That's what all our claim
6 data is matched up against. So when a claim comes in from a
7 customer, when I've said we match against our files, that's
8 the database it's going against. What records do you have
9 out there on this car and waybill? Do you have a wreck file?
10 Do you have an inspection record? Do you have an unusual
11 occurrence or do you have a previous claim?

12 Q So if I called up about my loss of milk or my
13 attorney did, you would pull up the database rather than
14 necessarily having to go to the file cabinet and pull out the
15 file?

16 A Yes. Yes. That would tell me if it's under
17 investigation or if I paid it or if I disallowed it to you.

18 Q And how long are the records on the database kept?

19 A They are the same as the ICC regs. We try to keep
20 three years, three years of live data.

21 Q So as the file is closed and paid or otherwise, it
22 comes off the data system as well?

1 A Yes.

2 Q There is no backup system for it?

3 A They make a purge listing in that. But with that,
4 it's a listing. I can't necessarily -- if you called me up
5 now, depending on what you could tell me, I would not be able
6 to find anything. It's not something I can massage. Like
7 when you call now to my inquiry sections and you tell me the
8 car number and the waybill date, I can find your claim for
9 you. On the purge system, I don't believe we can do that
10 because it's just a purge listing.

11 Q If I wanted to find information about a claim that
12 was made six years ago that you paid, how would I go about
13 that?

14 A I don't know because everything that I would need
15 is stricken including the listing.

16 Q Would the orders department or the financial
17 control department keep a record of the check that was paid?

18 A They may have. I'm going to answer this question
19 two ways. I think they may have microfilm of the check. But
20 to get to the check they would have to -- I'd have to tell
21 them the number.

22 Q Claim number of some sort?

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1 A Well, I would have to have a check number. And to
2 get to the check number I would have to know about the claim,
3 the claim number. And so my records would be gone six years
4 ago. If I settled it six years ago, my records would be
5 destroyed. I don't think I could get you to it.

6 Q I know that if a UOR occurs at a particular
7 facility involving hazardous material, a report has to be
8 filed, the Department of Transportation and the AAR gets a
9 copy and that kind of thing. If a claim is made concerning
10 hazardous material and a payment is made on the basis of the
11 loss of lading, do you file any additional report?

12 A No.

13 Q To any federal regulatory body?

14 A No.

15 Q Any state body?

16 A No.

17 Q Well, let me ask you a direct question. Suppose I
18 suffered a loss back in 1969, is there any information I
19 could get from your or your department, your corporation
20 involving that incident?

21 A Not that I know of.

22 Q Post 1969, post 1976, when CONRAIL takes over, and

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1 I have a claim, say, 1978, where would I go? How would I go
2 about trying to get some information about how that loss of
3 lading occurred?

4 A I don't follow that.

5 Q Or if there was an incident involving a loss of
6 lading, how would I get that information?

7 A If it supposedly happened in 1978?

8 Q 1976, 1977, 1978?

9 A I don't know where you would start.

10 Q Does your department work in conjunction with the
11 security department of CONRAIL down in Philadelphia? There
12 is a safety and security department as well as a hazardous
13 material department. Do you work or are you in contact with
14 them on any kind of a regular basis?

15 A No.

16 Q Is your department put on notice or made aware of
17 any particular product that extra care should be taken with
18 in handling by the railroad?

19 A Not really because we're not involved with the
20 actual physical movement of the train.

21 Q Does your department issue any advisories to other
22 departments of the railroad regarding the handling of a

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1 particular commodity?

2 A I don't follow what you mean.

3 Q Well, if you got a claim for an explosion, you
4 know, gasoline or something like that or propane gas or
5 something of that nature, and you had to pay it, would you
6 then issue any kind of an advisory to the railroad yards or
7 any other departments to be on the lookout and be extra
8 careful in handling this type of product in the future?

9 A My claims services directly, no.

10 Q That would be the department -- that would be the
11 responsibility of hazardous substances or safety?

12 A Yes. Whoever's department it would come under the
13 jurisdiction would be.

14 Q Other than possibly the audit department that we've
15 spoken about keeping the microfiche of the checks paid, are
16 there any other places where records are retained longer than
17 the three year period, for example, in Philadelphia?

18 A Not that I know of.

19 Q Are there any warehouse facilities where records
20 are kept that you know of outside of Philadelphia or Buffalo
21 or outside the offices in Philadelphia and Buffalo?

22 MR. ERMILIO: You are talking about claims records?

1 MR. RUVOLO: Yes.

2 THE WITNESS: As far as claims records, not that
3 I'm aware of.

4 BY MR. RUVOLO:

5 Q How about insurance records?

6 A I don't know about those.

7 Q Do you recall any claims made and/or satisfied,
8 paid, involving any type of hazardous material during the
9 last ten years?

10 A Not that I recall.

11 Q Would it be fair to say that your interest is not
12 so much in the commodity, but value of it and whether there
13 is liability for the loss?

14 A I think that would be fair, yes. I think that's
15 more that -- that's my function. My function is to make the
16 customer whole if we're responsible. So, yes, the value,
17 that's what I look at and to assure that there was a loss and
18 it was our responsibility, yes.

19 Q And suppose there was a loss and it contained a
20 hazardous material in one of your facilities, say Elkhart,
21 and in addition to the loss of lading, there was injuries
22 sustained by either a citizen or a CONRAIL employee, who

1 would handle that aspect of the incident or pay off or
2 investigation?

3 A Injury to an employee?

4 Q Yes.

5 A That would come under our personal injury
6 department.

7 Q Which you have no connection with?

8 A No.

9 Q How about injury to a citizen who was standing by?

10 A I am fairly sure that that also comes under their
11 jurisdiction.

12 Q How about damages to private property?

13 A That's their jurisdiction too.

14 Q So your department -- if my house got -- I live
15 near the railroad and my house got caught on fire because of
16 a derailment of some sort, I wouldn't go to you?

17 A No.

18 Q But who would handle that? What department?

19 A That would be our personal injury department or
20 general claims as they're called now.

21 Q Going back to what I asked you before, would that
22 be the same department that would handle the damage to the

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1 car?

2 A No, I don't believe so. No.

3 Q That's separate?

4 A Correct.

5 MR. RUVOLO: Let me take a minute.

6 MR. ERMILIO: Peter, could we take a minute and ask
7 Mr. Messler to leave the room for a minute so you and I can
8 discuss a couple of things regarding this deposition?

9 MR. RUVOLO: Sure.

10 MR. ERMILIO: I think it may be efficient to do it
11 that way.

12 (A brief recess was taken.)

13 BY MR. RUVOLO:

14 Q I've just got a few more questions. If you would,
15 I would like some more information on your database system,
16 when it was put into effect and how it has expanded to what
17 it includes today?

18 A Okay. I think we installed the system -- I would
19 say in 1975 it went into full operation. It may have been
20 1974, but I think 1975. And actually as far as any true
21 changes, there really hasn't been any. I mean, the system
22 was built such that we've never really had to make any major

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1 modifications.

2 Everything was -- the capability was there for all
3 the records that came into us to be somehow tied into the
4 system which we always use a car number and a waybill date
5 and it works for us. Just the nature of the business we're
6 in, everything we deal with is a car number and a waybill
7 date, so any records we get are all tied to that.

8 We may have -- as far as enhancements, the major
9 change would have just been from the type of device. When we
10 first put the system in, our input was the original
11 terminals. I think they were. But to describe them, they
12 were like a big IBM Selectric typewriter and we had a big box
13 here which was our storage, our own disk pad. Well, now we
14 have the PCs and the CRTs. I really can't think of any other
15 enhancements other than that.

16 Q And you said that you maintained that the database
17 in Buffalo, but it's also connected to Philadelphia, the
18 main?

19 A Yeah, I guess maybe that's a better way to explain
20 it. We import everything in Buffalo and we are on-line to
21 the main frame computer. So what we do, like right now, if I
22 called my office right now, maybe this would help explain it.

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1 If I called my office right now, the only thing I couldn't
2 tell you is what they had done today. I could tell you
3 everything up through last night. So what we key in today,
4 our files are upgraded tonight. But the system has always
5 operated that way.

6 Q Can anybody else, say, from Philadelphia, gain
7 access into your database to check up on a particular claim
8 or a pending claim?

9 A Not unless they have been granted authorization for
10 that.

11 Q But they can do it with the authorization?

12 A The ability is there, yes.

13 Q And is it capable from Philadelphia as well as it
14 is from Buffalo? Do they have to call you or can they just
15 do it?

16 A No. If they have access, they could go in on the
17 same system and bring up a menu and they could go in with a
18 claim number or a car number and a waybill date and bring up
19 the record, yes.

20 Q I take it other departments are on the same kind of
21 a system?

22 A I would say yes. I don't know that firsthand, but

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1 I would say, yes, they are. I mean, I see data sometimes
2 and, yes, they have to be tied to the same type because
3 that's what we do.

4 Q I mean, you would not have authorization, for
5 example, to go into the litigation files, I presume, dealing
6 with a personal injury action?

7 A No.

8 Q But litigation could and somebody probably from the
9 personal injury department has access to the same system?

10 MR. ERMILIO: Access to what?

11 MR. RUVOLO: To the information on the personal
12 injury claim.

13 THE WITNESS: I don't believe they have access. I
14 think they would come to us to ask. Personal injury, I
15 believe -- I'm pretty sure they would come to us and ask for
16 the record if they were looking for something we might have.
17 As I recall, they don't have direct access. There is very
18 few people that do. Or if they do have it, it's strictly for
19 into customer type thing.

20 Maybe to answer that better, we may give to a high
21 level person in the sales department authority level to go in
22 and just check on status for a claim. It's a very good -- to

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1 give an example, if they were out visiting a customer and
2 they want to really impress him, they pull out their laptop
3 and do a few things and say, "What was that claim number
4 now?" And they would key it in and, "Oh, they paid that last
5 Friday to you," that type of thing, but not a lot of records.

6 Q Or to avoid a customer if you had to pay too many
7 claims. Is there any kind of a -- well, is there any kind of
8 a menu that's either printed or on the system that tells you
9 what the various -- what various departments have information
10 on the system?

11 A I don't --

12 Q Well, if you pushed in a menu and it said lading
13 claims?

14 A I don't know that there is. When I said "menu,"
15 that was applying to our system.

16 Q No. What I'm talking about is there a menu for the
17 entire system that you know of?

18 A For all the systems on CONRAIL?

19 Q Yes, that are punched into this main frame
20 computer?

21 A Not that I know of. I don't know that. There
22 probably is a list of all the systems out. We're a separate

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1 system.

2 Q Right. That would be Philadelphia anyway?

3 A Correct.

4 MR. RUVOLO: I have no further questions, Mr.
5 Messler. I appreciate your time and cooperation.

6 EXAMINATION BY COUNSEL FOR DEFENDANT

7 BY MR. ERMILIO:

8 Q I just have a few questions. Going back the system
9 you were talking about, is there a way to plug in some sort
10 of information and pull out all claims relating to the
11 Elkhart yard, Elkhart rail yard?

12 A Not that I'm aware of.

13 Q Are you familiar with how the system operates?

14 A Yes, I am.

15 Q Were you involved with the system at the time it
16 was installed?

17 A Yes. When I first came into the claims department
18 as a supervisor, that became one of my responsibilities as
19 they were building the system. So I became the liaison
20 between the claim office and Business Systems, which is Data
21 Systems, who were building it. To answer that better, I
22 moved from Philadelphia to Buffalo, and then ended up

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1 spending three days a week in Philadelphia.

2 Q Okay. Similar question, can you plug in a
3 commodity name like carbon tet and pull up all claims
4 relating to carbon tetrachloride?

5 A Not the commodity name, but if it has a distinct
6 STCC code, I could go into the system and get a list of all
7 claims that were filed on that or charges we might have
8 gotten from a foreign railroad where they had the claim, yes.

9 Q Okay. And if there is a claim made for loss of
10 lading and you don't have in the claim file an unusual
11 occurrence report, do you know where that loss of lading
12 occurred?

13 A Not unless I had a record file, no. There would be
14 nothing that would pinpoint it then.

15 Q What happens if a tank car arrives at its
16 destination and it has a loss of lading? That tank car has
17 traveled over three different railroads, not just CONRAIL,
18 railroad X and railroad Y as well, but there is no unusual
19 occurrence report. There is no way of identifying where this
20 loss occurred, but it does appear to be a legitimate claim.
21 What do you do with that claim?

22 A Well, we would investigate it. And our

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1 investigation would be, as I've answered previously, we see
2 what we have that matches up in our office. Then we would
3 write to --

4 Q Railroad X?

5 A And ask them for any records they have. If they
6 had none, but yet we still had enough evidence that
7 definitely -- that the customer has met their burden of
8 proof, which is good order at origin, bad order at
9 destination, then we would pay that claim to the customer.
10 And I would then charge that out to each railroad based on --
11 well, we use mileage because that's unlocated. If I have
12 unlocated loss, I charge it out based on mileage. I would
13 prorate that out.

14 MR. ERMILIO: I don't have any other questions

15 FURTHER EXAMINATION BY COUNSEL FOR PLAINTIFF

16 BY MR. RUVOLO:

17 Q Just to follow up a little. You mentioned if it
18 had a STCC code; is that what you said?

19 A STCC code. It's slang, I guess. S-T-C-C, which is
20 standard transportation commodity code.

21 Q And how is that issued?

22 A There is a --

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1 Q Who issues it and how?

2 A Don't hold me to who issued it. It's a national
3 book that's so thick and it's all possible commodities, and
4 they all have a seven or eight digit number assigned to them
5 that's used in transportation.

6 Q Is that what's -- is that the code that's used on
7 the placards that are placed on cars that may contain a
8 hazardous substance?

9 A I don't know that for sure. If it's the commodity
10 code, I would say probably, yes. That is a commodity code,
11 yes.

12 Q And when Mr. Ermilio asked you if you could trace a
13 product, you said, "if I had the STCC code or the commodity
14 code," you could trace claims made for loss of lading?

15 A I could pull down, say, finished automobiles. The
16 reason I say that, we handle a lot of them. 37111 is the
17 first five digits of the finished autos that we drive. A
18 finished auto is a car that's already done. I could go in,
19 yes, and pull a listing of all the claims that are on my
20 active file that has been filed on finished automobiles.

21 Q Regardless of where in the system they occurred?

22 A Yes. Because all of the claims come to me.

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1 Q All right.

2 A But that I -- you said regards to the system -- in
3 the system where it occurred --

4 Q In other words, I don't know if it happened in
5 Cleveland or it happened in Altoona or it happened in
6 Elkhart. If it was on your --

7 A I don't -- I wouldn't care.

8 Q But you would have the record of it, is what I'm
9 trying to find out?

10 A Right. Right.

11 Q So if there was a loss of carbon tet and you had
12 the code number for it, you could trace from your system
13 where any claims were made for loss of lading involving
14 carbon tet throughout your system?

15 A The claim would be made to me. That's the only
16 place it would come, the loss for lading.

17 Q Yes. But even if it occurred in Cleveland,
18 Buffalo, or Altoona or Elkhart it would come to you?

19 A Yes.

20 Q So you would have a record of it?

21 A Yes.

22 Q So if there were four incidents involving that

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1 product, you would have four different claim numbers?

2 A As long as there was a claim filed, yes.

3 Q Right. But you are telling me, and you told us
4 earlier, that you only go back three or four years unless a
5 suit was -- or it was in litigation?

6 A Right.

7 Q So you have nothing in your files right now beyond
8 1990, or prior to 1990, except what's in litigation, 1989?

9 A Somewhere in there, yes.

10 MR. RUVOLO: Okay. Thank you, sir. I have no
11 further questions.

12 MR. ERMILIO: I have no other questions.

13 (Whereupon, at 2:15 p.m., the deposition of MARTIN
14 J. MESSLER, JR. was adjourned.)

15 * * * * *

16 I have read the foregoing pages, which are a
17 correct transcript of the answers given by me to the
18 questions therein recorded.

19 Deponent _____

20 Date _____

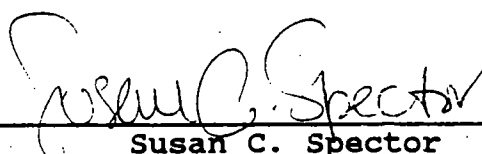
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C E R T I F I C A T E

THE UNITED STATES OF AMERICA)
)
IN THE DISTRICT OF COLUMBIA)

I, Susan C. Spector, Notary Public, before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing pages was duly sworn by me; that the testimony of said witness was reported by me by stenomask and thereafter reduced to typewritten form; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by any of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any attorney or counsel employed by the parties thereto, nor financially or otherwise interested in the outcome of this action.



Susan C. Spector
Notary Public in and for the
District of Columbia

My commission expires:
April 14, 1995

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

V.

CONSOLIDATED RAIL CORPORATION,
a/k/a CONRAIL,

Defendant.

CIVIL ACTION NO.
S90-0056

Judge Robert J. Miller

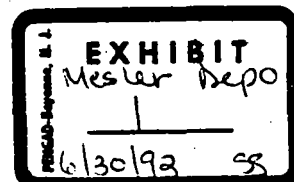
NOTICE OF FILING OF DISCOVERY

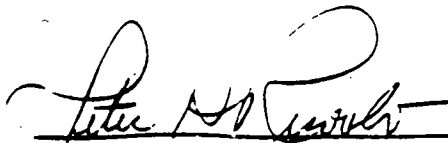
On the 14th day of June, 1993, Plaintiff, the United States of America, on behalf of the United States Environmental Protection Agency, served the attached Notice of Deposition of James Messler on counsel of record as described in the attached certificate of service.

Dated: June 14, 1993

Respectfully submitted,

MYLES E. FLINT
Acting Assistant Attorney General
Environment and Natural Resources Division





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UNITES STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	CIVIL ACTION NO.
)	S90-00056
V.)	
)	
CONSOLIDATED RAIL CORPORATION,)	Judge Robert J. Miller
a/k/a CONRAIL)	
)	
Defendant)	

NOTICE OF DEPOSITION OF JAMES MESSLER

Pursuant to Rules 30 and 34 of the Federal Rules of Civil Procedure, Plaintiff United States of America shall take the deposition of James Messler, on Wednesday, June 30, 1993 at 1:00 p.m. before a notary public at the offices of Bingham, Dana & Gould, 1550 M Street, N.W., Suite 1200, 12th Floor, Washington, D.C. 20005 or at such times and locations mutually agreed upon by counsel. The deponent is requested to produce for inspection and copying all documents and tangible things, as defined in Rule 34(a), including but not limited to: all writings; memoranda (both intra and inter-office); correspondence; notes; maps; graphs; charts; tables; data compilations; tests, analyses, photographs; drawings; and recordings of any kind, in his custody or control any records of any releases of hazardous substances into the environment, as these terms are defined in CERCLA Section 101, 42 U.S.C. § 9601, and any unusual occurrences, spills or leaks of hazardous substances in the vicinity of the

Robert Young Railyard in Elkhart, Indiana or in any way associated with the activities, operations or properties of Conrail in the vicinity of Elkhart, Indiana. The Deposition will continue from day to day as necessary.

Dated this 14th day of June 1993.

UNITED STATES OF AMERICA

MYLES E. FLINT
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CERTIFICATE OF SERVICE

I hereby certify that the forgoing United States of America's Notice of Deposition of James Messler has been served upon the following parties by first class United States mail on this 14th day of June, 1993.

Signed,

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